

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

**REPLY COMMENTS OF THE
CORPORATION COMMISSION OF THE STATE OF KANSAS IN RESPONSE TO
PUBLIC NOTICE DA 11-1348'S FURTHER INQUIRY INTO CERTAIN ISSUES IN
THE UNIVERSAL SERVICE INTERCARRIER COMPENSATION
TRANSFORMATION PROCEEDING**

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EXECUTIVE SUMMARY

State commissions and carriers in early adopter states have put the FCC on notice. If the FCC proceeds with the ABC Plan without a longer transition period for early adopter states and/or further analysis of the impacts of the plan on existing state reform mechanisms, it risks irreparable harm to these complementary state reform vehicles. Early adopter states receive insufficient recognition in the Plan for their prior rate rebalancing, universal service contribution and access reform contributions. The Plan wholly fails to address the interplay between these mechanisms and the federal mechanism. If the Commission adopts the ABC Plan, it should address the risks that state funds could be eliminated, among other serious early adopter state consequences.

After \$870,000,000 of consumer contributions made to support universal service and other important public policy goals over the last fourteen years, the Kansas Universal Service Fund (“KUSF”) will be one of the state funds most at risk for becoming unsustainable under the ABC Plan. Under **unique Kansas law**, described in detail below, the KUSF **must** compensate Kansas’ 37 rural telephone companies for interstate and intrastate access revenue lost due to FCC-directed access charge reductions and must determine appropriate revenue recovery to cover ILEC revenue deficiencies based on ILECs’ embedded costs if the federal universal service fund (“FUSF”) causes them to under-recover high costs of basic universal services. The two price-cap companies operating in Kansas, have the right under Kansas law to make requests of the KUSF for access restructuring revenue losses, and may be expected to litigate their claims aggressively. The KUSF had one of the highest universal service assessment rates in the nation: 9%, when it was established. If adopted by the FCC, the ABC Plan will likely cause that KUSF contribution factor to exceed that level.

As various carriers and states have pointed out, the ABC Plan's federal mechanism will not provide restructuring compensation to carriers on a revenue neutral basis (regardless of whether revenue neutrality is a desirable goal). Further, the Plan's rate "ceilings" are not a consumer protection mechanism because they only serve (purportedly) to limit SLC increases. While the FCC commenced this process by declaring its intention to reduce the burden on individual residential and business customers, the only effect of the Plan and increasing SLCs is to do exactly the opposite, and directly impose a greater cost burden on customers. By making the Federal SLC unavailable as a source for relief, the ceilings will only propel Kansas carriers to look even more quickly to the back-stop KUSF for relief.

Due to unique Kansas law, the KUSF will be forced to provide recourse for rate-of-return carrier and potentially price-cap carrier revenue losses shortly after they occur. The ABC Plan could shift \$10 million in access revenue recovery alone to the already burdened KUSF. The USF support amount that the ABC Plan will shift to the KUSF is unknown because the record is precariously incomplete, but the amount is likely to be substantial. With the loss of VoIP contributions, the KUSF will be in a downward spiral, forced to increase its assessment surcharge on an ever diminishing state revenue base.

The impacts will be felt statewide. A high assessment rate could adversely impact state economic development efforts to attract businesses, grow the Kansas economy and increase jobs. In the end, the ABC Plan threatens to make the KUSF unsustainable, both financially and politically. The FCC will have to bear more of the obligations to achieve universal service, access reform and broadband deployment goals if the state Legislature reacts by terminating, or sharply limiting, the KUSF.

The KCC joins the comments of state commissions, carriers, public interest groups and others strongly objecting to the short notice and comment period, and the Plan's failure to put fundamental data on the record including the model, model runs, Plan impacts, and other key information that underlie the Plan's arguments and conclusions that it will achieve its goals. The FCC's lack of due process surprisingly fails to live up to the standards it espouses as being a data-driven transparent decision-maker.

The KCC agrees with a number of other commenters on other key points. It joins NARUC and other state commissions in objecting to the Plan's preemption provisions. This includes a Plan provision that, if adopted, would likely reverse the FCC's 2010 declaratory ruling confirming that State USFs may assess the intrastate revenues of VoIP providers. As many report, state commissions can play a key role in implementing reform, such as auditing to prevent over recovery of universal service support, or waste and abuse of the system. Preempting states will rob the FCC of state local knowledge, resources, and financial contributions that are indispensable to making the reform effort work.

The KCC also joins commenters who object to limiting to satellite technology supported service to the highest cost areas. Satellite may not be the most efficient, reasonable quality or desirable technology for consumers in these locations. Limiting support in this manner obviates any semblance of consumer choice.

The KCC recommends that the FCC implement reform in stages, ordering immediately what can be effectively and safely accomplished now, and setting timeframes for reform that requires more data analysis. The FCC can immediately implement parts of the proposal on traffic pumping, adopt rules to address phantom traffic and determine that interconnected VoIP providers are providers of telecommunications service and thereby immediately subject to the same intercarrier compensation rates applied to all other traffic that uses the PSTN. Then, it should

implement universal service and intercarrier compensation reform in a manner that addresses early adopter state issues differently. For example, it could establish a two tier reform plan, implementing reform for early adopter states in a second phase, or establish a much longer transition period for all states so that they have time to adjust their reform mechanisms, laws and regulations to the wholly new federal system. **It should not order any short term reductions in interstate access charges in states such as Kansas which have already, after great expenditure in time, effort and dollars, brought their intrastate rates down to interstate levels.**

As it proceeds on reform, the FCC should quantify as precisely as possible whatever transitional make-up funding the FUSF will provide and explain how that funding is determined. In that way, the KUSF will be in a position to credit the provider with federal funding when calculating the KUSF dollars required to make that carrier whole, as appropriate. It should adopt detailed rule changes so that states can determine how much support carriers will receive on the federal level for access restructuring and universal service support, so that states can assess the increased burdens their state funds or access recovery mechanisms risk having to bear, well before that “shoe drops.”

These are extremely important policy matters to the KCC. A high KUSF assessment rate will ultimately be borne by businesses and consumers all across the state, on top of all the telecommunications charges on their bills. An increasing KUSF can be expected to significantly impact economic development in Kansas as it competes to attract businesses that rely on telecommunications to the state. For example, at the current KUSF assessment rate of about 6%, Kansas is under little economic disadvantage relative to many states. But, if the FCC takes actions to reduce support currently included in numerous programs and reduce FUSF funding,

unique Kansas law allows for carriers to be made whole through the KUSF. If the KUSF assessment rate soars to, say, 20% or 25%, Kansas will be limited in its ability to attract businesses to the state that rely on communications services that are assessed by the KUSF. That means job losses and a diminution in the state's economic development all driven by the FCC's national agenda, not Kansans. The KCC urges the FCC to recognize early adopter states' reform efforts already well underway and to transition federal reform in a manner that does not threaten the sustainability of state funds and other state access restructuring revenue recovery mechanisms.

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The Kansas Corporation Commission (“KCC”) submits these reply comments in response to the FCC’s Public Notice, DA 11-1348, *Further Inquiry into Certain Issues in the Universal Service Intercarrier Compensation Transformation Proceeding* (“FCC Notice”), which sought further comment on universal service (“USF”) and inter-carrier compensation (“ICC”) reform. The KCC previously filed comments in these dockets on April 1 and 18, 2011.

I. INTRODUCTION.

From what is known about the ABC Plan, a hasty implementation will likely cause a train wreck in Kansas in addition to other early adopter states. The KCC makes the following points in reply comments:

- The ABC Plan does not explain how the federal access charge recovery mechanism will interplay with state mechanisms already in place in early adopter states to address carriers' revenue losses due to access charge rate restructuring or provide sufficient detail for early adopter states to analyze revenue recovery shifts for universal service support;
- Kansas state law provisions requiring biannual increases to the local "affordable rate," rate rebalancing, a KUSF access make-whole provision and the KUSF provision basing universal service support on embedded cost could cause the state to have to absorb significant cost shifts;
- The FCC will exacerbate pressure on state funds if it declares all VoIP traffic interstate and so arguably reverses its 2010 Declaratory Ruling authorizing state USFs to access intrastate VoIP revenue;
- If the FCC adopts the ABC Plan, it should first implement rules to address traffic pumping and phantom traffic, and hold that interconnected VoIP providers are providers of telecommunications service subject to the same intercarrier compensation rates applied to other PSTN traffic;
- Then, it should implement remaining universal service and intercarrier compensation reforms on a phased, or tiered basis, addressing early adopter states in a second stage after they have an opportunity to adjust their laws and regulatory mechanisms to the federal rule changes;
- It should not make these new second stage reforms effective until exhaustion of all appeals;
- The FCC should refrain from ordering near-term further reductions in interstate access charges in early adopter states like Kansas which have already reduced intrastate access charges to interstate levels;
- The FCC should not preempt states' authority to implement aspects of the FCC's universal service mechanism or states' authority to regulate service and COLR responsibilities; and
- The FCC should make support available for the highest cost areas on a technology-neutral basis, and not limit consumers to satellite if it is not the most cost effective, desirable or appropriate solution.

II. FACTUAL BACKGROUND.

As one of the most rural states in the nation, Kansas receives substantial support currently from the rural and non-rural high-cost funds to offset the high cost of providing

telecommunications service in its rural areas.¹ The state has two larger ILECs operating under price cap regulation and 37 smaller ILECs operating under rate-of-return regulation.

The KCC implemented the KUSF in 1996 to fund Lifeline, dual party relay, telecommunications equipment for persons with special needs, as well as support universal service² as part of broad state legislation that mandated intercarrier compensation reform, among other measures. When established, the KUSF had one of the highest state universal service assessment rates in the nation – 9%. The assessment rate has generally decreased as the KCC has taken steps to ensure that KUSF support is cost-based and carriers have modernized their networks.

Currently, the total KUSF funding obligation is \$65.7 million with an assessment rate of 6.18% on carriers' intrastate retail revenues.³ In contrast, FUSF high cost support for Kansas carriers is about three times the size of the KUSF. If the FUSF high cost support is reduced by half, that can be expected to more than double the size of the KUSF due to Kansas laws mandating make whole flow through of any reduction in federal support.

Over the past 14 fund years, from March 1997-February 2011, Kansans have contributed approximately \$870 million in support of universal service. Additionally, as intrastate access reductions were implemented and the fund was shifted to a cost-based fund, local rates have increased to ensure consumers in all regions of the state are paying comparable rates and sharing in the burden of making subsidies explicit. Thus, Kansas consumers already are making a substantial contribution to universal service costs in the state. Kansas has been doing its part to

¹ In 2010, 51 Kansas carriers received \$193,709,479 in high-cost support from the USF.

² K.S.A. 66-2002(h) states: "The Commission shall:...on or before January 1, 1997, establish the Kansas universal service fund pursuant to K.S.A. 66-2008..."

³ The total current KUSF funding obligation includes funding for high-cost support, Lifeline, dual party relay service, telecommunications equipment for persons with special needs, and Kan-Ed, which is a program to expand the collaboration capabilities for schools, libraries and hospitals. The current KUSF high-cost funding obligation is \$50.3 million.

support universal service and intercarrier compensation reform, and should not be penalized because it was an early adopter of reform measures.

Generally, the KUSF must compensate rate of return ILECs for access charge revenue losses due to government-mandated interstate or intrastate access charge reductions.⁴ Price cap carriers have the right to make similar requests although the KCC may have a greater degree of discretion in responding to their requests.⁵ Additionally, the KUSF compensates rate of return ILECs for high universal service costs based on embedded cost calculations.⁶

It is important to emphasize that these peculiarities of the KUSF arise from Kansas statutes and court decisions – they are not policy determinations of the KCC, nor does the KCC generally control the size of the KUSF. As discussed in more detail below, the KCC has a limited degree of control with respect to price cap carriers and very little control at all with respect to rate-of-return carriers. If the FCC changes the FUSF or mandates a reduction in interstate access charges or removes VoIP revenues from USF assessments, Kansas could not react with changes in KCC filings or policy to accommodate the FCC's changes and the KUSF would inevitably soar to historically unprecedented levels. The only avenue available to Kansas to react would require state legislative action, which is both slow and uncertain.

For additional Kansas-specific facts, please see the Comments filed by the KCC in this docket on April 1 and 18, 2011.

⁴ See K.S.A. 66-2005(c)(1): Any reduction of a rural telephone company's cost recovery due to reduction of its interstate access revenue shall be recovered from the KUSF. Subsection (c)(2) applies similar rule to reductions in intrastate areas charges.

⁵ See K.S.A. 66-2008(d): Additional funding may be requested for: The recovery of shortfalls due to additional rebalancing of rates to continue maintenance of parity with interstate access rates; shortfalls due to changes to access revenue requirements resulting from changes in federal rules...

⁶ See K.S.A. 66-2008(e): For each local exchange carrier electing...to operate under traditional rate of return regulation, all KUSF support...shall be based on such carrier's embedded costs, revenue requirements, investments and expenses.

III. THE ABC PLAN MAY CAUSE A TRAIN WRECK IN EARLY ADOPTER STATES; THE PLAN'S RATE "CEILINGS" AND COST RECOVERY MECHANISMS WILL NOT ASSURE AFFORDABLE LOCAL RATES

A. The Plan will Penalize Early Adopter States

As the Michigan Public Service Commission,⁷ the Kansas Rural Independent Telephone Companies,⁸ New Mexico Public Regulatory Commission,⁹ and the Nebraska Rural Independent Companies¹⁰ have suggested, among others, the FCC should treat early adopter states differently than other states that have not yet implemented access reform. The KCC is greatly concerned that the ABC Plan will penalize states like Kansas that already have state funds, particularly where the state fund operates as a backstop to cover ILECs' access restructuring revenue losses not compensated by the FUSF. The \$25 (rate-of-return carrier) and \$30 (price-cap carrier) "ceilings" (the term the FCC uses at page 11 of its public notice) on rates will not mitigate

⁷ The Michigan Commission states: "The MPSC initially notes that there would be some inherent disadvantage to Michigan customers if providers in states that have not enacted intrastate access reform receive intrastate access revenue recovery support through a federal mechanism for intrastate access reductions. If Michigan telephone customers contribute to the federal ARM/USF/CAF that will provide support to carriers in those states that have not enacted intrastate access reform, Michigan customers will effectively be helping to subsidize the reduction of intrastate access rates to interstate rate levels in other states. However, as Michigan has already enacted intrastate access reform, the total cost of support for Michigan's providers to reduce their intrastate access rates to current interstate levels has likely been born[e] by Michigan customers alone. This would hold true for other states that have already enacted, and borne the cost of, intrastate access reform as well. A decision by the FCC with this result effectively punishes the customers in states that have begun the process of reform." Comments of the Michigan Public Service Commission, WC Docket No. 10-90, *et al.*, filed August 24, 2011 at 13 (hereinafter "Michigan PSC Comments").

⁸ The Kansas Independent Companies state: "If transitional or incremental reduction of intercarrier compensation is imposed, it would be reasonable to exempt "early adopter" states like Kansas from rate reductions and compensatory contributions until other states' rates have reached the current interstate and Kansas levels. Not only would such an approach avoid discriminatory burdens on early adopter states, but it would also achieve earlier rate uniformity among states without aggravating disruption from accelerated reductions in states that have maintained high intrastate rates." Comments of Kansas Rural Independent Telephone Companies, *et al.*, WC Docket No. 10-90, *et al.*, at 9.

⁹ New Mexico states: "The NMPRC urges the Commission to take into account New Mexico's efforts and other 'early adopter' states that have begun access reform. New Mexico ratepayers currently pay a surcharge for intrastate access rate reductions. Any approved compensation plan determined by the Commission shall take that consideration the diligent reform steps taken in New Mexico and not further burden our ratepayers with higher shares to offset other states failures to respond and take action." Letter from Jerome D. Block, Vice-Chairman of New Mexico Public Regulation Commission to Records Clerk of the FCC dated May 20, 2011, WC Docket No. 10-90, *et al.*

¹⁰ Comments of the Nebraska Rural Independent Companies, WC Docket No. 10-90, *et al.*, filed August 24, 2011 at 83.

potential impacts on consumers in states that have already begun reforms (and thus where consumers are already paying increased local rates and/or state universal service contributions associated with that reform).¹¹

Likely, the ceilings will only push Kansas carriers faster to the KUSF for revenue recovery. As the FCC Notice says, the ceilings are “structured as a ceiling on consumer rate increases (*via a federal SLC*) to limit increases in consumer rates in states where such rates have already been raised as part of intrastate access reform.”¹² Under the ABC Plan, no *SLC* increase (shifting revenue recovery from access charges to the subscriber line charge) may cause the basket of local rates, federal SLCs, state SLCs, mandatory EAS and state per line contribution to the state’s high cost fund to exceed \$30 per month for price cap carriers and \$25 per month for rate of return carriers.¹³ Yet, if there is under-recovery, the ceiling will not preclude carriers from increasing the basic rate beyond \$25 or \$30 through higher state USF surcharges or higher local rates. Multiple states including Kansas have partially or totally deregulated basic local phone service rates,¹⁴ and the only component of retail local service pricing that the FCC regulates is the federal SLC. Thus, a carrier may face no constraint whatsoever in increasing basic local rates to the point that total local rates are well above the illusory ceiling.

Based on the elements considered in the “ceilings,” five Kansas rural ILECs currently have rates that exceed the \$25.00 benchmark. Assuming no other changes, the proposed June 2012 \$0.75 SLC increase will result in eleven Kansas rural ILECs exceeding the benchmark. Additionally, under state law, Kansas must recalculate the affordable residential rate to be

¹¹ See FCC Notice, p. 11. See also Michigan PSC Comments at 10 (Expressing concern that Michigan carriers will seek recovery of lost access revenue from the Michigan Access Recovery Mechanism.)

¹² Id. emphasis added.

¹³ America’s Broadband Connectivity Plan Framework of the Proposal, filed in WC Docket 10-90, *et al.*, July 29, 2011 at 12 (hereinafter “ABC Plan”).

¹⁴ Comments of The National Association of State Utility Consumer Advocates (NASUCA), WC Docket No. 10-90, *et al.*, filed August 24, 2011 at 60 (hereinafter “Comments of NASUCA”).

effective March 2013. At that time, all but four of the rural ILECs will have rates that exceed the \$25 benchmark.¹⁵

Moreover, Kansas rate-of-return carriers and arguably price-cap carriers can also turn to the KUSF to recover access restructuring losses. Thus, a carrier that decides not to increase basic local rates to recover lost access revenue could demand increased KUSF support, resulting in increased KUSF assessments that providers then pass on to consumers. This creates a whole new set of problems that are addressed in the next section of these comments. The key point here is that the \$25/\$30 “ceilings” apply only to one of the many line items that make up a consumer’s local phone service bill (the federal SLC) and so are not genuinely meaningful ceilings. They will not provide any real consumer protection.

B. The ABC Plan does not Guarantee Replacement Revenue through its Access Charge Restructuring Mechanisms.

The KCC is very concerned that carriers will resort to the KUSF to make them whole because the ABC Plan will not guarantee replacement revenue despite purported transitional access charge restructuring mechanisms.¹⁶ Instead, the Plan’s emphasis is on keeping FUSF support within a strict budget of about \$4.5 billion.¹⁷ Equally importantly, the FCC itself in its NPRM declined to assume any duty to make LECs whole for reductions in revenue from access charges. “We do not believe that recovery needs to be revenue neutral given that carriers have a variety of regulated ... and non-regulated revenues.” FCC USF/ICC Reform NPRM, ¶ 178 (FCC Doc 11-13). Accordingly, even if the FCC provides some FUSF support to recover some part of

¹⁵ These four RLECs do not currently receive KUSF support, but if they request support, their local rates would need to be increased to the statewide affordable rate.

¹⁶ See Comments of the Louisiana Public Service Commission, WC Docket No. 10-90, *et al.*, filed August 24, 2001 at 3-4 (hereinafter “Comments of Louisiana PSC”) (The federal recovery mechanism will not provide a predictable means of support.)

¹⁷ ABC Plan at 1.

the lost access charge revenue, the KUSF will likely be the easiest and most attractive “target” for LECs seeking to make up losses in access revenue that result from reform.

The transitional mechanism will fall short of compensating for revenue losses. For price cap LECs, the ABC plan provides a transitional access replacement mechanism only for carriers that experience “exceptionally large reductions in intercarrier compensation revenue”¹⁸ and allows them to recover only a limited portion of their intercarrier revenue reductions from universal service support.¹⁹ As US Telecom has confirmed, access recovery funding for price cap carriers will be “relatively small and will fit easily within the overall budget set out in the Consensus Framework filing.”²⁰

A strict budget applies to rate-of-return carriers as well. It begins at \$2 billion, and allows increases of \$50 million per year but only for a total of \$300 million by the end of a six year transition.²¹ The budget must cover not only access restructuring losses, but also broadband build out and a reasonable opportunity to recover costs associated with existing investments in broadband capable plant.²² With so many purposes, there is certainly a significant risk that the mechanism will not be able to compensate rate-of-return carriers fully for access restructuring-related losses. Also, both mechanisms are transitional, and will be eliminated entirely over time.²³

¹⁸ ABC Plan at 12.

¹⁹ *Id.*

²⁰ Letter from Jonathan Banks, US Telecom, to Ms. Marlene Dortch, dated August 16, 2011, WC Docket No. 10-90, *et al.* at 1-2.

²¹ ABC Plan Letter, dated July 29, 2011 at 2.

²² *Id.*

²³ *Id.* at 2. *See also*, Comments of Nebraska Rural Independent Companies, WC Docket No. 10-90, *et al.*, filed August 24, 2011 at 67-69. (The recovery mechanism support will not be predictable or sufficient for a number of reasons, including that all rate of return switched access revenues are at risk of elimination or reduction to near zero levels under the Industry Plans; the Plan’s promises that scheduled intercarrier rate reductions will be delayed if sufficient funding is not available for high cost or intercarrier compensation are not likely to come true; regardless of what the FCC does, Plan incentives will cause carriers to self-declare all their traffic as VoIP and thus subject to, at best, interstate rates for two years, then decreasing to \$.0007.)

Kansas carriers may turn to the KUSF in order to make up for the loss of revenue resulting from the reduction of interstate and intrastate access charges due to FCC USF/ICC reform and the impact will be substantial. Kansas law appears to require that its state universal service fund guarantee, or at least, provide recourse for, rate-of-return carriers' access charge revenue losses caused by FCC changes in access policy.²⁴ Under K.S.A. 66-2005(c), if the FCC requires rate-of-return LECs to lower interstate or intrastate access charges, or the KCC lowers intrastate access rates to comply with a separate state law requiring that FCC-ordered reductions in interstate access rates be matched with reductions in intrastate access rates, the KUSF **must** cover any access revenue losses that the carriers incur.²⁵

In short, if the FCC requires rate-of-return carriers to reduce interstate access rates, that FCC action will likely trigger a duty on the part of the KUSF to make rural companies whole for those interstate access losses. Further, the FCC-mandated reduction in interstate access rates will likely trigger corresponding state-mandated reductions in intrastate access rates in Kansas, and in turn, a corresponding obligation to use the KUSF to make rural companies whole.²⁶

²⁴ The KCC does not concede that there is a state-law "make-up" obligation, but acknowledges that one appears to exist, at least as to rural telephone companies. There are some complexities in reading the state statute and the possibility that preemption of part of Kansas law would lead a Kansas court to declare that other parts of the Kansas statute are inseverable from the expressly preempted parts. Finally, the KCC may be able to conduct an audit that results in offsetting reductions in KUSF support if the evidence shows carrier revenues exceed costs.

²⁵ K.S.A. 66-2005(c)(1) states: "Any reduction of a rural telephone company's cost recovery due to a reduction of its **interstate** access revenue shall be recovered from the KUSF." (emphasis added) Also, K.S.A. 66-2005(c)(2) requires the KCC to use KUSF funds to make up rural telephone company lost revenues resulting from reductions in intrastate access charges.

²⁶ K.S.A. 66-2005(c) mandates that rural telephone companies reduce intrastate access rates to interstate levels every two years. The KCC may, however, be able to conduct a rate case to verify that the rural company's "embedded costs" justify the level of KUSF support it requests. K.S.A. 66-2008(e). It would, however, be difficult, if not impossible, for the KCC to fund and allocate resources necessary to conduct audits potentially on 37 telephone companies at the same time.

Resorting to the KUSF is not as automatic for price-cap carriers, but it is still a recourse.²⁷ The Kansas statute at K.S.A 66-2008(d) allows price cap ILECs, wireless and other qualified carriers to seek support from the KUSF to make-up shortfalls due to access revenue requirement changes resulting from FCC-directed access rate reductions. Where significant funding is at stake, price-cap ILECs can be expected to litigate their claims to KUSF support aggressively.

It is likely that reducing interstate access rates consistent with the ABC Plan could trigger a reduction in intrastate access revenues of \$10 million for Kansas ILECs which will increase the pressures already faced by the KUSF. The additional KUSF support would likely increase the KUSF assessment rate paid by providers and passed on to consumers up to over 9.3% -- the highest assessment rate in the history of the fund.²⁸ Because Kansas federal high-cost support is approximately triple the size of the KUSF, if the federal high cost support is reduced, by say, half, that will more than double the size of the KUSF. Interstate access charge reductions and VoIP from USF assessments have similar impacts on the size of the KUSF. If the FCC adopts the ABC Plan, a KUSF assessment rate in the 20-25% range is not outside the realm of possibility. Other early adopter states will likely face similar challenges.²⁹

²⁷ See K.S.A. 66-2005(c): "Subject to the commission's approval, all local exchange carriers shall reduce intrastate access charges to interstate levels as provided herein...The commission is authorized to rebalance local residential and business service rates to offset the intrastate access and toll charge reductions. Any remaining portion of the reduction in access and toll charges not recovered through local residential and business service rates shall be paid out from the KUSF pursuant to K.S.A. 66-2008." The KCC interprets this provision to give it discretion as to whether or not to grant KUSF recovery for FCC-directed access rate reductions.

²⁸ This assumes funding for all other KUSF programs remains constant, and an aggregate \$9.7 million recovery of intrastate access revenues. KUSF Funding is also reduced to recognize additional revenues that will result from rebalancing residential and single-line business rates to the statewide affordable rates. The intrastate revenue base is reduced approximately \$233 million, or 27%, to recognize that by time the ABC ICC reforms are fully implemented, wireline revenues will substantially decline as customers transition to wireline and VoIP services. Under the ABC Plan, VoIP revenue would apparently not be assessable.

²⁹ Michigan estimates that customer rate increases resulting from increases to the federal SLC and the federal and state access recovery mechanism will be significant. Michigan PSC Comments at 11.

Such changes in state funds can be expected to have a direct impact on economic development and a state's ability to attract and retain communications-intensive businesses. For example, if, as a result of FCC actions in this proceeding, the KUSF assessment rate rises to, say, 20% that means that one of every five dollars spent on intrastate communications services in Kansas would be earmarked for those who receive KUSF support. A high-tech, communications-centric company would find Kansas to be uncompetitive with other states that did not levy such a perceived "tax" on their communications services.

Increases in the KUSF and other make-whole state USF plans, will significantly burden state commissions. About half of all the communications proceedings before the KCC are KUSF related – companies seeking more KUSF support, companies seeking to become eligible for KUSF support, audit-related activities of KUSF recipients, and audit-related activities of KUSF contributors. If the KUSF balloons because of changes in federal policy, it is reasonable to expect that controversies and filings involving the KUSF and state USF funds will increase.

C. The FCC Should Provide a Transition Plan That Recognizes that State USFs Will Be Under Intense Pressure to Make up for Access Reductions Ordered by the FCC.

The KCC recognizes that one way to protect the KUSF from this potentially unlimited "make-whole" liability is to modify state law to eliminate any KUSF make-whole duty. However, such a dramatic change in state law requires legislation and, thus, is uncertain, will take time to accomplish, and cannot realistically be done until the contours of federal reform are known. For this reason, it is absolutely critical that the FCC provide States adequate additional time to react to whatever reform order the FCC issues, so that "train wrecks" such as that

outlined above can be avoided through changes in State policy, regulation and (in some cases) statutes.³⁰

The easiest way for the FCC to provide states with time to avoid a train wreck in which federal reform balloons the KUSF is for the FCC to refrain from ordering any short term reductions in interstate access charges in states such as Kansas which have already brought their intrastate access rates down to interstate levels. The arbitrage danger which concerns the FCC is largely a result of differences between interstate and intrastate access rates – a difference which does not exist in Kansas. If the FCC orders longer-term reductions in interstate access levels, rather than short and medium term reductions, the KCC will have more time to secure changes to state law that avoid ballooning the KUSF with make-whole obligations. Making those changes in state law will avoid increasing the KUSF assessments that providers pass on to consumers.

Further, it is equally important that the FCC's reform order quantify as precisely as possible whatever transitional "make up" funding the FUSF will provide. If the FCC were to order a reduction in access charges in its first order, and leave the details of the transitional FUSF support mechanism to a second order, Kansas ILECs, in the interim, will zero in on the KUSF as the source of make-whole funding. By contrast, if the FCC quantifies the make-up funding it is providing through the FUSF, and how that funding is determined, then the KUSF will be in the position to credit the provider with that federal funding when calculating the amount of KUSF dollars needed to make the provider whole for lost access revenue. Quantifying the transitional federal make-up support would not require the FCC to publish a table listing specific FUSF support amounts by provider, but it would likely require the FCC to adopt sufficiently complete rules so that the provider and the KCC can accurately make those calculations.

³⁰ See, Comments of the Missouri Public Service Commission, WC Docket No. 10-90, filed August 24, 2011 at 10-11 (hereinafter "Comments of Missouri PSC").

D. The ABC Plan Lacks Critical Details.

As many States have pointed out, the lack of key details in the ABC Plan violates interested parties' due process and statutory rights to notice and comment and makes the record too incomplete to serve as a basis for reasoned decision-making.³¹ The ABC Plan does not describe how the federal recovery mechanism will interplay with state mechanisms already in place. For example, besides the KUSF make-whole requirement, Kansas law contains requirements that the KCC determine (and likely increase) "affordable" rates every two years based on a statewide average local rate,³² and access charge restructuring-related rate rebalancing.³³ Customers could face higher state USF surcharges (in that the KUSF would have

³¹ Comments of the Nebraska Public Service Commission at 3, 12-13, 19; the Michigan Public Service Commission at 2, 4, 14; the Louisiana Public Service Commission at 2; Comments of Maine Public Utilities Commission (MPUC), Vermont Public Service Board (VPSB), and Vermont Department of Public Service (VDPS), WC Docket No. 10-90, filed August 24, 2011 at 11, 18-19 (hereinafter "Comments of MPUC/VPSB/VDPS"); the Iowa Utilities Board at 2; and the NARUC at 3, 7-9.

³² K.S.A. 66-2005(e) requires the Commission to calculate an affordable rate for local exchange service provided by a rural telephone company subject to traditional rate of return regulation for purposes of determining sufficient KUSF support. K.S.A. 66-2005(e)(1)(C) states: As of March 1, 2007, and each two years thereafter, an affordable residential service rate shall be the weighted arithmetic mean of local service rates determined as of October 1 of the preceding year in the manner hereinbefore specified, except that any increase in such mean exceeding \$2 may be satisfied by increases in a rural telephone company's residential monthly service rate not exceeding \$2 per year, effective March 1 of the year when such mean is determined, with the remainder applied at the rate of \$2 per year, but not to exceed the affordable rate. K.S.A. 66-2005(e)(1)(D) states: For single line business service at any time, an affordable rate shall be the existing rate or an amount \$3 greater than the affordable rate for residential service as determined under provision (1) of this subsection, whichever is higher, except that any increase in the business service affordable rate exceeding \$2 may be satisfied by increases in a rural telephone company's business monthly service rate not exceeding \$2 per year, effective March 1 of the year when such rate is determined, with the remainder applied at the rate of \$2 per year, but not to exceed the affordable rate.

³³ K.S.A. 66-2005(c) states: Subject to the commission's approval, all local exchange carriers shall reduce intrastate access charges to interstate levels as provided herein. Rates for intrastate switched access, and the imputed access portion of toll, shall be reduced over a three-year period with the objective of equalizing interstate and intrastate rates in a revenue neutral, specific and predictable manner. The commission is authorized to rebalance local residential and business service rates to offset the intrastate access and toll charge reductions. Any remaining portion of the reduction in access and toll charges not recovered through local residential and business service rates shall be paid out from the KUSF pursuant to K.S.A. 66-2008, and amendments thereto. Each rural telephone company shall adjust its intrastate switched access rates on March 1 of each odd-numbered year to match its interstate switched access rates, subject to the following: (1) Any reduction of a rural telephone company's cost recovery due to reduction of its interstate access revenue shall be recovered from the KUSF; (2) any portion of rural telephone company reductions in intrastate switched access rates which would result in an increase in KUSF recovery in a single year which exceeds .75% of intrastate retail revenues used in determining sums which may be recovered from Kansas telecommunications customers pursuant to subsection (a) of K.S.A. 66-2008, and amendments thereto, shall be deferred until March 1 of the next following odd-numbered year; and (3) no rural

to compensate carriers for \$9 - \$10 million of intrastate access reductions), higher local rates, SLC increases and other unknown charges, all at the same time. Furthermore, federal USF reforms will likely also impact the KUSF, as those reforms may result in under-earnings for the Kansas RLECs. Pursuant to Kansas statute K.S.A. 66-2008, the KUSF for a RLEC is based on the company's embedded costs, revenue requirements, investments, and expenses. Thus, a reduction in a carrier's interstate federal USF could result in an increase in its intrastate revenue requirement and its KUSF funding. Due to the lack of details in the ABC Plan, the Commission cannot quantify the additional impact that such federal USF reforms may have on the KUSF.

The FCC should seek information showing the impacts of its plan on early adopter state mechanisms like the KUSF before it acts on universal service reform. Based on information in the record now, there is a significant risk that rates could increase to unaffordable levels in Kansas under the ABC Plan.

IV. THE FCC SHOULD NOT RISK INADVERTENTLY REVERSING ITS OWN 2010 DECLARATORY RULING BY COUNTER-FACTUALLY DESIGNATING 100% OF VOIP TRAFFIC AS "INTERSTATE"

The KCC agrees with National Association of Regulatory Utility Commissioners (NARUC), the Nebraska Public Service Commission and the Public Service Commission of the District of Columbia that the FCC should not risk inadvertently (or intentionally) reversing the FCC's 2010 Declaratory Ruling confirming that State Universal Service Funds (State USFs) may assess the intrastate portion of revenue from VoIP telephone calls.³⁴ The FCC issued that Declaratory Ruling in response to a petition from the KCC and the Nebraska Public Service

company shall be required at any time to reduce its intrastate switched access rates below the level of its interstate switched access rates.

³⁴ *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, 25 FCC Rcd. 15651, ¶¶ 1, 14-16 (2010) ("State VoIP USF Assessment Order").

Commission that was vigorously contested but that resulted in a unanimous ruling that no party appealed and that the KCC has successfully implemented.

Should the FCC now reverse tracks and declare 100% of VoIP traffic to be interstate, meaning 0% of VoIP traffic is deemed intrastate, that FCC action will be construed by providers as preempting State USF assessments of VoIP traffic, because State USFs very likely may only assess intrastate traffic under current law.³⁵ As VoIP replaces circuit-switched technology, that reversal would reduce the State USF assessment base, thereby reducing the assistance that State USFs now provide to the FUSF in maintaining universal service. Thus, declaring VoIP traffic to be 100% interstate contravenes the Act's admonition that "[t]here should be specific, predictable, and sufficient Federal *and State* mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5) and (f) (emphasis added).

The FCC has always recognized that VoIP revenues were divisible into interstate and intrastate portions for universal service assessment purposes. In 2006, the FCC adopted a rule that imposed FUSF assessments on the interstate portion of VoIP revenues and gave VoIP providers flexible options for estimating that interstate portion.³⁶ Specifically, the FCC authorized VoIP providers to presume that 64.9% of their traffic is interstate and 35.1% is intrastate, and to pay contributions to the Federal USF on the 64.9% of their revenues presumed to be interstate. Alternatively, the FCC allowed VoIP providers to use traffic studies or actual traffic measurements to divide revenues.

³⁵ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999); see also 47 U.S.C. § 254(f) (State USF mechanisms may not "burden" federal USF mechanisms).

³⁶ *In the Matter of Universal Service Contribution Methodology*, 21 FCC Rcd. 7518, 7536, ¶ 34 (2006) *aff'd in part and rev'd in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

In its 2010 Declaratory Ruling, the FCC cleared up confusion resulting from intervening judicial rulings by confirming that the remaining intrastate portion of State USF revenues (35.1% for VoIP providers who choose to use the safe harbor) was assessable by State USFs:

In light of the [2006 order requiring VoIP providers to make FUSF contributions on interstate revenues], we conclude that the application of state universal service contribution requirements to interconnected VoIP providers does not conflict with federal policies, and could, in fact, promote them. Such providers benefit from state universal service funds, just as they benefit from the federal Universal Service Fund, because their customers value the ability to place calls to and receive calls from users of the PSTN [Public Switched Telephone Network]. Similarly, extending state contribution requirements to nomadic interconnected VoIP providers promotes the principle of competitive neutrality by reducing the possibility that carriers with universal service obligations will compete directly with providers without such obligations.³⁷

While the ruling expressly approved State USF assessment of nomadic VoIP providers, who claimed inability to determine call end points, the precedent effectively extended to fixed VoIP providers, who know the end points of calls being made from fixed locations, and so can divide revenues by jurisdiction even more easily. Fixed VoIP includes mainly cable providers who allow customers to make calls only from the location of the coaxial cable connection to their home or business. Nomadic VoIP providers generally send calls over the public Internet, and allow the customer to use any broadband connection.

The FCC's thorough evaluation of the issue of State USF assessments of intrastate VoIP revenues in its 2010 Declaratory Ruling affirming states' authority to assess state universal service contributions on the intrastate revenues of nomadic VoIP providers remains 100% correct. The FCC's decision reflected a careful balancing of interests that should not be disturbed.³⁸ There is absolutely no basis, factual, legal or policy, to reverse that decision. The FCC's 2006 and 2010 decisions recognize two realities: (1) some portion of consumer calls

³⁷ *State VoIP USF Assessment Order*, 25 FCC Rcd. 15651, ¶¶ 1, 14-16 (internal quotations omitted).

³⁸ The FCC did not rule on the validity of State assessments preceding the date of its order. *State VoIP USF Assessment Order*, ¶1.

made using VoIP technology are between two points within the same state (intrastate) and some portion are interstate, and (2) there is no need to measure those portions precisely, or to assign specific calls to specific regulatory jurisdictions, when the objective is only to divide aggregate VoIP revenues into a portion assessable by Federal USFs and a portion assessable by State USFs. For the FCC to “wave a magic wand” and declare 100% of VoIP revenues to be from interstate calls, when consumers in fact clearly make considerable numbers of intrastate calls using VoIP telephones, and providers earn intrastate revenues from those calls, would be arbitrary and capricious. It would be inexplicable in light of the FCC’s treatment of wireless revenues, which the FCC for more than a decade has divided into an interstate portion assessable by the FUSF and an intrastate portion assessable by State USFs, using a “safe harbor” approach very similar to that now used by the FCC for VoIP calls.³⁹

At the very least, the FCC should limit any preemption ordered due to alleged inseverability of VoIP calls into interstate and intrastate jurisdictions so that it does not affect state regulations (such as State USF assessment regulations) that do not require classification of individual telephone calls as interstate or intrastate. The State USF assessments of VoIP traffic approved by the FCC in the State VoIP USF Assessments Order require only an after-the-fact division of aggregate revenues into interstate and intrastate portions; a task now easily accomplished applying the same methodology the FCC used in its 2006 Order specifying VoIP providers’ obligations to contribute to the FUSF on interstate revenues.

Both fixed and nomadic VoIP are significant contributors to the KUSF, and these providers’ contributions will increase even more, proportionately, over time, as VoIP is the wave of the future. Even if current trends of gradually increasing use of VoIP technology hold true,

³⁹ See *In the Matter of Universal Service Contribution Methodology*, 21 FCC Rcd. 7518, 7536, ¶¶ 27, 53 (2006) (reviewing previous orders setting the safe harbor adopted for dividing wireless revenues into interstate and intrastate portions for purposes of FUSF and State USF assessments, and updating that wireless safe harbor).

and there is no dramatic shift to VoIP as providers replace their existing equipment over time, the KUSF projects that there will be \$500 million in assessable VoIP revenue in Kansas alone over the next five years. By the end of the five-year period, VoIP revenue would make up more than 6% of the entire KUSF assessment base. If that revenue is eliminated, the surcharge on remaining circuit-switched intrastate revenue will be increased, putting even more pressure on the KUSF, and unfairly disadvantaging circuit-switched customers and providers as compared to VoIP customers and providers.

The communications industry is nothing if not innovative and able to exploit any regulatory loophole, and VoIP is not an exception. A trend in rural areas is to provide communications services via fixed wireless or WISP networks in lieu of landline networks. Placing an antenna on a grain silo or mountain top and providing wireless broadband service via technologies such as Motorola Canopy is done today in rural areas. In such a configuration, voice communication is provided via VoIP in lieu of a traditional landline. If VoIP providers are exempted from State USF contributions, then an enterprising ILEC with an aging landline network could deploy an inexpensive wireless network and avoid making USF payments because it was a VoIP provider. Yet, it could collect State USF support from make-whole state funds, such as the KUSF, for its embedded costs of its unused landline network.

V. THE FCC SHOULD MAKE SUPPORT TO THE HIGHEST COST AREAS TECHNOLOGY NEUTRAL.

The KCC agrees with commenters that, if the FCC goes forward with separate funding for extremely high cost areas, that it should allow consumers to obtain service not just from satellite providers as the ABC plan proposes, but from wireless or other providers.⁴⁰ The highest cost Kansas areas may be less expensive to serve via wireless or other technologies. The FCC

⁴⁰ See Comments of NASUCA at 9-23; Comments of MPUC/VPSB/VDPS at 5.

should not preclude carriers from having access to support just because they do not use satellite technology. In some cases, wireless technology may offer customers better quality service at a comparable or lower price. Limiting support to satellite obviates any semblance of consumer choice, at least as to an alternative such as that identified by Public Knowledge.⁴¹

Because of its asymmetric upload and download speeds, satellite technology is not the best transmission path for VoIP. Further satellites cannot be used for voice communications of any kind (circuit-switched or VoIP) without transmission delays (due to the time needed for signals to travel to and from distant satellites) that are very noticeable to the consumer and significantly degrade voice communications. While access to broadband is a critical element of the nation's communications policy, so is access to affordable voice communications. Fixed wireless technologies and WISPs can provide high quality voice services via VoIP; satellite-based services cannot.

VI. THE FCC SHOULD EMBRACE STATES' HELP IN ACHIEVING UNIVERSAL SERVICE AND BROADBAND DEPLOYMENT GOALS, NOT PREEMPT STATE LAW.

The KCC agrees with NARUC that the ABC Plan's argumentative justifications for preempting state law do not have any basis in law or sound policy.⁴² (For a discussion of preemption as it relates to VoIP calls specifically, see the prior section of these reply comments).

A. Response to ABC Argument for Preemption as to ICC Rates.

The ABC Plan cites 47 U.S.C. § 251(b)(5) as its principal justification for preemption of state regulation of intrastate access rates. The KCC joins in NARUC's legal analysis of Section 251(b)(5), Section 251(d)(3), and Section 251(g). NARUC's analysis shows the preemption

⁴¹ Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge to Marlene H. Dortch, Secretary, FCC, dated July 28, 2011 at 1.

⁴² Comments of NARUC at 9-17.

request is baseless. In particular, Section 251(d)(3) is tellingly entitled “Preservation of State *Access* Regulations.” (Emphasis Added). It is *permanent statutory law* preserving state access charge regimes that are “consistent” with federal law. It lacks the transitional feature of Section 251(g) that might allow the FCC to adopt superseding preemptive regulations regarding other matters. Further, the KCC reminds the FCC of Section 261, which expressly preserves all state regulations that are “not inconsistent” with FCC regulations, including “exchange access” regulations. 47 U.S.C § 261. State “exchange access” regulations further competition, among other ways, by providing a basis for state resolution of inter-carrier disputes, which are far too numerous for the FCC to ever hope to resolve itself given the limited number of employees in the FCC Enforcement Bureau’s Market Disputes Resolution Division.

Moreover, there can be no good-faith argument whatsoever that Section 251(d)(3) permits preemption of state regulation of intrastate access rates when, as in Kansas, those rates are equal to interstate access rates. Section 251(d)(3) and 261 do not require that intrastate access rates equal interstate access rates in order for those rates to be “not inconsistent,” and thus protected from preemption by those sections. 47 U.S.C. § 251(d)(3), 261.⁴³ However, at the very least Sections 251(d)(3) and 261 defeat any claim for preemption when interstate and intrastate rates (whether called “access” or something else) are equal, or approximately equal, and so clearly “not inconsistent.” In that scenario, continued state regulation, among other things, provides state forums with expertise to resolve inter-carrier disputes, and so avoids putting the entire dispute resolution burden on the FCC and its Enforcement Bureau Staff.

The KCC also joins in NARUC’s legal analysis of Section 252, which provides the state commissions and not the FCC with jurisdiction under federal law to determine the precise inter-

⁴³ When Congress enacted Section 251 and the other “local competition” provisions of the 1996 Act in 1996, intrastate and interstate access rates were very different, yet Congress acted in Section 251(d)(3) to “preserv[e] state access regulations” (the title of the statutory section).

carrier compensation rates in the context of interconnection arbitrations between ILECs and CLECs and ILECs and wireless carriers. Because of Section 252, any FCC action to preempt state commissions from regulating intrastate access rates *under state law* would not strip the state commissions of their exclusive Section 252 authority *under federal law* to determine precise ICC rates in interconnection arbitrations between ILECs and CLECs and ILECs and wireless carriers. 47 U.S.C. § 252(d)(2) (determination of whether charges under Section 251(b)(5) for transporting and terminating calls are “just and reasonable” is to be made by “a State commission.”)⁴⁴ However, in that scenario, there would be a troubling gap in the law as to CLEC-to-CLEC and CLEC-to-wireless ICC rates, because Section 252 limits state interconnection arbitrations to cases involving ILECs.⁴⁵

CLECs and wireless carriers have in multiple instances failed to reach commercial agreements on rates. That troubling gap is best avoided by not preempting the state commissions’ existing authority *under state law* to regulate intrastate ICC rates. The FCC recognized the gap-filling value of state law regulation of intrastate ICC rates in its recent *North County* decision. There, the FCC directed a CLEC to go to the California PUC to determine rates under state law for termination of intrastate long distance (interMTA) wireless-to-CLEC calls where the wireless carrier and CLEC exchanged calls but could not agree on rates for doing so.⁴⁶ The D.C. Circuit recently affirmed the FCC in that case.⁴⁷

B. Response to ABC Plan’s Other Preemption Arguments.

⁴⁴ See Comments of NARUC at 11-13 (reviewing the 8th Circuit and Supreme Court precedent on this issue).

⁴⁵ *AT&T Comm. of California, Inc. v. Pac-West Telecomm, Inc.*, 2011 WL 2450986, note 3, (9th Cir. Case No. 08-17030, June 21, 2011) (“the [Act] leaves something of an enforcement gap: CLECs have statutory duties to interconnect with other LECs and to provide reciprocal compensation, but there is no procedure specified for one CLEC to require another CLEC to enter into an interconnection agreement that would govern the terms of those duties”).

⁴⁶ *North County Communications Corp. v. MetroPCS California, LLC*, 24 FCC Rcd. 14036, ¶ 12 (2009), *affd.* *MetroPCS California, LLC v. FCC*, 644 F.3d 410 (D.C. Cir. 2011).

⁴⁷ *Id.*

Apparently recognizing that their strained Section 251(b)(5) preemption argument is necessarily limited to the narrow topic covered by Section 251(b)(5), transport and termination of local calls by local exchange carriers, and seeking to also preempt state regulation of retail service (specifically the “duty to serve” and State carrier-of-last-resort or COLR regulations), the ABC Plan asserts other preemption theories.⁴⁸ Most incredibly, the ABC Plan makes the bizarre suggestion that the FCC can label all traffic as jurisdictionally “inseverable,” either economically or practically. This ridiculous proposal tries to maneuver around the express language of Section 152(b) of the Act, which provides that the states shall have exclusive jurisdiction over intrastate calling, subject to limited exceptions that are too confined for the ABC Plan:

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission [the FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier...

47 U.S.C. § 152(b). The ABC Plan’s claim that all calls are “inseverable” (i.e. there is no practical way to tell if telephone calls are interstate or intrastate) is a strained counter-factual effort to maneuver into the narrow “impossibility” exception to Section 152.

The ABC Plan’s strained “inseverability” claim defies the facts, precedent, and logic and is poor policy. Providers have differentiated intrastate from interstate calling through actual traffic measurements, percentages of interstate usage reports, and estimates for at least 30 years, since the advent of the parallel interstate and intrastate access charge systems at the time of the Bell Breakup in the early 1980s. The FCC approved procedures for determining percentage-of-interstate usage in the 1980s and has rarely had to revise the procedures in the decades since

⁴⁸ See ABC Plan at 13.

then, demonstrating that the system works reasonably well.⁴⁹ Present-day access tariffs filed with the FCC and the state commissions by the ABC Plan proponents and other LECs are replete with these standard procedures for determining percentage-of-interstate use.⁵⁰ While intrastate and interstate access rates are equal in Kansas, the fact that intrastate and interstate access rates differ in several other states only demonstrates the continuing ability of providers to differentiate between interstate and intrastate calls in billing charges. The burden is on the ABC Plan proponents to prove inseverability as a factual matter. They have not even attempted to introduce the specific facts necessary to carry that burden.

Technology is going in the direction of capturing more rather than less call information, and technology improves rather than regresses over time.⁵¹ Identifying a customer's location is increasingly important for marketing location based services and public safety tracking, such as for E 911. Also, the FCC has repeatedly adopted "safe harbor" percentages to allocate revenues of providers of mobile services (wireless and certain types of VoIP service) between the interstate and intrastate jurisdictions for purposes of federal and state universal service

⁴⁹ *In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, 4 FCC Rcd. 8448 (1989) (final order in series of orders establishing percentage of interstate use rules applicable to various traffic types, summarizing history of these orders and concluding that estimates submitted by IXC's can be used to determine call jurisdiction where LECs lack ability to do so).

⁵⁰ *See, e.g.*, Verizon Telephone Companies FCC Tariff No. 1 ("Access Service") Section 2.3.10, 3rd Revised Page 2-15.1 ("The Telephone Company will apply the PIU factor provided by the customer as set forth in (A)(1)(b) only to minutes of use for which the Telephone Company does not have sufficient call detail to determine jurisdiction."); The Fairpoint Telephone Companies, Tariff FCC No. 1 ("Access Service"), Section 2.3.10, Original Page 2-17 ("When the Telephone Company receives sufficient call detail to permit it to determine the jurisdiction of some or all originating and terminating access minutes of use, the Telephone Company will use that call detail to render bills for those minutes of use and will not use customer reported Percent Interstate Usage (PIU) factors to determine the jurisdiction of those minutes of use. The Telephone Company will apply the PIU factor provided by the customer ... only to minutes of use for which the Telephone Company does not have sufficient call detail to determine jurisdiction"); Frontier Telephone Companies, Tariff FCC No. 2 ("Access Service"), Section 2.3.10, Original Page 2-13 (similar).

⁵¹ *See* Comments of MPUC/VPSB/VDPS at 13.

assessments, recognizing that estimates are acceptable and that precise actual traffic measurements are not necessary in all cases.⁵²

Other specific provisions of the Act demonstrate that the Act does not permit the sweeping preemption the ABC Plan seeks, under which the FCC would expand the exceptions to Section 152(b)'s rule that States have exclusive state jurisdiction over intrastate calling to such an extreme that the "exceptions would swallow the rule." *See* 47 U.S.C. § 253(b) (expressly preserving the States' ability "to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers"); 254(f) ("A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service"); 251(d)(3) (preserving State access regulation), 261 (preserving State regulation generally). The ABC Plan's citation of Section 254(f) as an alleged basis for preemption, when in fact that section instead safeguards state universal service programs from preemption, shows the weakness in its legal argument.

C. Preemption is Bad Policy That Hinders Rather than Helps the FCC's Efforts.

As a policy matter, preempting state law will make it much more difficult, if not completely impractical, for the FCC to implement any reform it adopts (whether it be the ABC Plan or something else). States play a critical role in administering the federal state universal service partnership, and the FCC does not have the resources or local knowledge to take these

⁵² *See In the Matter of Universal Service Contribution Methodology*, 21 FCC Rcd. 7518, 7536, ¶¶ 27, 53 (2006) *aff'd in relevant part*, 489 F.3d 1232 (D.C. Cir. 2007) (allowing wireless carriers to assume 37.1% of their traffic is interstate, leaving 62.9% as intrastate; allowing VoIP providers to assume 64.9% of their traffic is interstate, leaving 35.1% as intrastate); *State VoIP USF Assessment Order*, 25 FCC Rcd. 15651, ¶¶ 17 (confirming State USFs may assess intrastate revenues of VoIP providers); *In the Matter of the Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 1735, ¶ 18 (1997) (confirming State USFs may assess intrastate revenues of wireless providers).

duties over effectively.⁵³ For example, Kansas law authorizes the KCC to conduct audits of carriers that seek support from the KUSF. In this process, Kansas audits have disallowed costs and lowered recovery. The state works hard to avoid fraud, waste and abuse that can divert funds needed for legitimate purposes. If the FCC preempted state authority to audit universal service support requests, it would lose this important check on fund size and would have to attempt to take on the responsibility of performing such audits and investigations itself.⁵⁴

On an even higher level, if the FCC declared all traffic interstate, why would any state fund exist? Based upon the 5th Circuit’s interpretation of Section 254, it appears that the state commissions are effectively limited to assessing intrastate revenues.⁵⁵ Therefore, if the FCC “waves a magic wand” and counter-factually declares all traffic to be “interstate,” including calls between points within a single state, there would be no assessment base for State USF funds, and State USFs would cease to exist, thrusting the entire universal service support burden on the FCC and the FUSF.

The KCC does not understand how preemption would work, as a practical matter, for Kansas and the KUSF. If all traffic was declared interstate, then what would the KUSF be assessed against? Preemption would effectively repeal the KUSF and all of its interrelationships with Kansas communications laws. For example, funding for 911 comes through the KUSF and is annually set by the Kansas legislature. How would that work if all traffic is declared interstate? About half of all the communications proceedings before the KCC are KUSF related – companies seeking more KUSF support, companies seeking to become eligible for KUSF

⁵³ Comments of NASUCA at 29; Comments of New York Public Service Commission (NYPSC), WC Docket No. 10-90, *et al.*, dated August 24, 2011 at 7, Comments of South Dakota Public Utilities Commission, WC Docket No. 10-90, *et al.*, dated August 24, 2011 at 3.

⁵⁴ Comments of NASUCA at 73.

⁵⁵ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999); see also 47 U.S.C. § 254(f) (State USF mechanisms may not “burden” federal USF mechanisms).

support, audit-related activities of KUSF recipients, and audit related activities of KUSF contributors. Would the FCC staff assume those functions under the preemption proposal?

The FCC should resoundingly reject the ABC Plan's call for preemption, and instead, identify ways that the states can shoulder important tasks in implementing reform. At a minimum, the FCC should not preempt state laws that allow states to create and regulate state universal service funds, perform audits and investigations related to carriers' requests for universal service support and certifications as to actual use of the funds. It should not "forbear" from areas where Congress saw a key local role for states, such as in designations of ETC status under 47 U.S.C. § 214(e).

VII. IF THE FCC ADOPTS THE ABC PLAN, IT SHOULD, GENERALLY, ENSURE A SUFFICIENTLY LONG TRANSITION PERIOD TO ALLOW STATES TO ADJUST STATE REGULATORY STRUCTURES

If the FCC adopts the ABC Plan, it must ensure that states have adequate time to adjust state regulatory structures.⁵⁶ In particular it should implement reform for early adopter states in a second phase or tier, so that their state mechanisms are not negatively impacted.

In its original comments in the Docket, the KCC urged the FCC to provide carriers and state commissions with a sufficient transition period before any major new rules become effective.⁵⁷ The KCC specifically noted that it needed time to address requests for make-up funding from the KUSF when access charges fall.⁵⁸

Adoption of the ABC plan would make a full transition period critical. The KCC would have to take a number of actions before the ABC Plan could be effectively implemented, including asking the Legislature to remove state law provisions requiring the KUSF to make up

⁵⁶Comments of NASUCA at 79. Comments of Missouri PSC at 10.

⁵⁷ Comments of Kansas Corporation Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 29.

⁵⁸ *Id.* at ¶ 40.

for lost access revenue, opening dockets to implement access charge decreases, rebalance local rates, and assuming it still retained the authority, initiate financial audits into any and all carriers' claiming increased support from the KUSF.

The FCC should not make major new rules (other than the expedited rules seeking to stop arbitrage) effective until after all appeals have concluded. The KCC concurs with NARUC that if the ABC Plan is adopted, the bulk of the issues "will be litigated and will present a multiplicity of opportunities for uncertainty, delay, and possible reversal of the implementation of any reform proposal."⁵⁹ If the KCC and other states undertake major actions in response to the FCC order, such as whether to grant make-up funding from the KUSF, and then the federal courts overturn the FCC reform order, much time and effort will be completely wasted. The FCC order will have such a profound effect on so many state laws and decisions, that utter confusion will reign if states make changes and then key parts of the FCC's order are then reversed on appeal. The regulatory risk will impede carriers' plans for broadband deployment, increase the cost of borrowing, and potentially, jeopardize dozens of RUS loans.

VIII. CONCLUSION

The FCC should implement reform in stages, ordering immediately what can be effectively and safely accomplished now, and setting timeframes for reform that requires more analysis. It should immediately implement parts of its proposal on traffic pumping, adopt rules to address phantom traffic and determine that interconnected VoIP providers are providers of telecommunications service and thereby immediately subject to the same intercarrier compensation rates applied to all other traffic that uses the PSTN. That will serve to achieve the

⁵⁹ Comments of NARUC at 6.

laudable goals of curtailing fraud, waste, and abuse, and an immediate expansion of the contribution base, so that stability is returned to universal service funding.

It should implement other aspects of reform in a manner that addresses early adopter states differently, such as through a two tier reform plan and provide a longer transition period so that states can accommodate the revised federal rules through legislative or administrative changes. The FCC should not order any short term reductions in interstate access charges in states such as Kansas that have already brought their intrastate rates down to interstate levels. To aid early adopter states further, it should quantify as precisely as possible whatever transitional make up funding the FUSF will provide and explain how the funding is determined. It should adopt clear detailed rule changes so that states can assess the increased burdens on their state funds or access recovery mechanisms.

Additionally, it should not adopt the ABC Plan's proposals for preemption of state authority and for classification of all VoIP traffic as interstate. It should not restrict support to the highest cost areas to satellite providers. Overall, it should proceed with reform, but in a manner that more fully assures its goals can be achieved.

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Respectfully submitted,

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